IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1583

EDMUND G. BROWN, JR.,
Secretary of State of the
State of California,

Appellant,

v.

RAYMOND G. CHOTE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEE

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INTRODUCTION AND SUMMARY OF ARGUMENT

The narrow question presented is whether this case is distinguishable from *Bullock v. Carter*, 405 U.S. 134. Appellee submits that it is not.

In *Bullock* a unanimous Court last Term held invalid, under the Equal Protection Clause of the Fourteenth

Amendment, Texas' primary election filing-fee system. Under the Texas system, candidates who could not afford to pay the required fees were, for that reason alone, absolutely excluded from the ballot. The "salient features" of the Texas system that the Court deemed "critical" to its "determination of constitutional invalidity" (405 U.S. at 149) are also present in California's system.

The Attorney General of California seeks to save his state's filing-fee system, despite its exclusion of poor candidates from participation in elections, by pointing to differences from the Texas system, particularly in regard to the size of the required fees and the method of computation. These differences are peripheral, and indeed irrelevant, to the constitutional analysis and judgment required under *Bullock*.

What was "critical" in *Bullock*, and is equally dispositive here, is that:

(1) The filing-fee system falls with unequal weight on voters, as well as candidates, according to their economic status (405 U.S. 144).

(2) While a state has a legitimate interest in regulating the number of candidates on the ballot and may protect the integrity of its political processes from frivolous or fraudulent candidacies, it cannot pursue those objectives by arbitrary means (405 U.S. at 145).

(3) Since filing fees exclude legitimate as well as frivolous candidates, solely because of their indigency, a filing-fee requirement "is extraordinarily ill-fitted to [the] goal" of regulating the ballot by weeding out spurious candidates; "other means to protect those valid interests are available" (405 U.S. at 146).

(4) Where a state "has, as a matter of legislative choice, directed that party primaries be held" and "has presumably chosen this course more to benefit the voters than the candidates," the conduct of primary elections is a governmental function, the cost of which may not "be shifted away from the taxpayers generally" to the candidates; a "different case" would be presented, however, where the filing fees cover only "the cost of processing a candidate's application for a place on the ballot" (405 U.S. at 148).

(5) By requiring filing fees of candidates and providing no reasonable alternative means of access to the ballot, the state "has erected a system that utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice" (405 U.S. at 149).

Here, as in *Bullock*, a strict standard of review is appropriate because the legislative classification is "suspect" and impinges upon the fundamental rights of voting and political association. In California, as in Texas, there is no way that voters can have their candidate considered for the party nomination if he cannot post the filing fee.

Even if the traditional standard of review were applied, the California filing-fee system would not meet the requirements of the Equal Protection Clause. Under the "rational basis" test, a legislative classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation," *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415. In

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175, a classification was struck down because the Court could find "no significant relationship" to the statutory purposes.

No legitimate state interest, whether in regulating the ballot (cf. *Bullock, supra*, at 145; *Jenness v. Fortson*, 403 U.S. 431, 442), or in requiring candidates to pay a fair share of primary election costs (but cf. *Bullock, supra*, at 147-48), is served by a filing-fee system where (a) the amount of the fee that a candidate must pay bears no relation at all to the costs attributable to his candidacy, but is based instead on a specified percentage of the salary for the office sought, and (b) an indigent, otherwise qualified candidate's inability to pay the fee results in his exclusion from the ballot, thus denying his supporters any opportunity to vote for the candidate of their choice. The California filing-fee system draws a line between candidates and voters based solely on their financial means. That kind of line is clearly forbidden by the Equal Protection Clause.

This conclusion does not compel invalidation of all candidate filing-fee requirements *per se*. As the Court indicated in *Bullock* (405 U.S. at 148, note 29), "a different case" would be presented where the fees approximate the administrative costs of filing or processing candidates' applications. As a practical matter, it seems unlikely that such true filing fees, necessarily modest in amount, *e.g.*, $5 or $10, would exclude any serious candidate. In any event, an indigent candidate could not be excluded from the ballot solely because of his inability to pay a fee, even though it may be reasonable and valid as applied to non-indigent candidates. Cf. *Boddie v. Connecticut*, 401 U.S. 371; *Harper v. Virginia Board of Elections*, 383 U.S. 663.

If a state's objective is to assure that only *bona fide* candidates, with at least a modicum of public support, are on the ballot, an obvious–and constitutionally justifiable–means of furthering that interest would be to require all candidates to show such support by filing nominating petitions signed by a reasonable number or percentage of eligible voters. Cf. *Jenness v. Fortson*, 403 U.S. 431, 442. California's filing-fee requirement, however, makes access to the ballot depend on how much money a candidate and his supporters possess. The financial burdens of running for public office are heavy enough without adding the further requirement that an impoverished candidate pay a tithe to the state as an absolute condition to getting his name on the ballot.

Appellant suggests that even a poor candidate should be able to raise the money to pay the fee by "passing the hat" among his supporters. In practical effect this would impose a selective discriminatory poll tax on some voters as a condition to being able to cast votes for the candidate of their choice, solely because of his inability to pay the required fee.

ARGUMENT

CALIFORNIA'S EXCLUSION OF INDIGENT CANDIDATES FROM THE BALLOT, SOLELY BECAUSE OF THEIR INABILITY TO PAY THE REQUIRED FILING FEES, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The court below correctly held that this case is governed by the unanimous decision last Term in *Bullock v. Carter*, 405 U.S. 134. The basic flaws in the Texas filing-fee system which led this Court to hold it

unconstitutional are also to be found in the California system.

We emphasize, at the outset, that under both systems there is simply no way that voters can have their candidate considered for the party nomination if he cannot post the required fee. Under neither system is any alternative means provided whereby an indigent candidate can get on the ballot. We submit that this case, like *Bullock*, boils down to a clear and simple proposition: No filing-fee requirement, regardless of its reasonableness, size, purpose, method of computation, or validity in relation to other candidates able to pay the fees, can survive judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment where its effect is to keep an indigent candidate off the ballot and thus deprive his supporters of any opportunity to vote for him. Whatever a state's legitimate interest in regulating the ballot or defraying election costs, it cannot exclude poor people, solely because of their poverty, from participating in the political processes as candidates or voters.

A. Comparison of California and Texas Filing-Fee Systems

Under the provisions of California's Elections Code, an otherwise eligible candidate who cannot afford to pay the filing fee fixed by statute is absolutely barred from the ballot, both at the primary and general elections. Write-in candidates and independent candidate nominees must also pay the statutory fees (see statutes cited in Appellant's brief, p. 5). In short, there is no way under California law for an indigent candidate to get on the ballot, no matter how serious his candidacy or how broad his support among the voters, if he is unable to pay the fee.

In contrast, under Texas law the filing-fee requirement was "applicable only to party primaries, and * * * a candidate can gain a place on the ballot in the general election without payment of fees by submitting a proper application accompanied by a voter petition." *Bullock, supra,* at 146. However, this Court rejected the argument that the limitation of the Texas filing-fee requirement to primary elections saved it from constitutional condemnation (*id.*, at 146-47); and it is noted here only to indicate that, in this respect, the California system is less defensible than that of Texas.

The basic contention of the Attorney General of California is that his state's filing-fee system differs from that of Texas in the "reasonable amount" of the fees, in the method of computation, and in its purpose of defraying, not all, but only "a reasonable portion of the governmental election costs" (Appellant's brief, p. 5).

In California the candidate filing fees for all offices (federal, state, and local) are fixed by state statute, and generally are equal to a percentage of the first year's salary for the office sought. The fee for candidates for United States Senator, Governor and other state offices, and some county offices, is two percent of the annual salary. Candidates for Representative to Congress (as in the instant case), State Senator or Assemblyman, or for judicial office or district attorney, must pay one percent. No filing fee is required of candidates in the presidential primary, or for offices which pay either no fixed salary or not more than $600 annually. (See statutes set forth in Appellant's brief, pp. 2-4.)

Thus, under the California statutes in effect at the most recent election for office, the required candidate filing fees ranged from $192 for State Assembly, $425

for Congress, $850 for United States Senator, to $982 for Governor[1] (Appellant's brief, p. 5).

In Texas, the filing fees for candidates for most local offices in primary elections were fixed by the party's county executive committee, while the fees required of candidates for state offices were more closely regulated by statute and tended to be appreciably smaller. The fees ranged from $50 to $8,900. *Bullock, supra*, at 137-40. Candidates for statewide offices, such as United States Senator and Governor, paid a fee of $1,000 (*id.*, at 140), while candidates for Congress could be assessed up to 10% of their annual salary (*id.* at 138, note 9).

The Texas system was plainly designed to place all, or almost all, of the burden of financing primary elections on the candidates. (*Bullock, supra*, at 138-39, 147-48.) The California system places only part of that burden on the candidates. The Attorney General of California states in his brief (p. 11, note 1) that the Secretary of State "is budgeted for over one million dollars for election expense of that office in 1972." That figure presumably includes the cost of both primary and general elections. He also states that the "total fees forwarded to [the Secretary of State] from candidates for Representative in Congress, State Senator, or Assemblyman in connection with the 1972 primary was $171,577." (*Ibid.*) We are not informed of the total filing fees paid by candidates for county office, which are retained by the county treasurer under Section 6656 of the California Elections Code (Appellant's brief, p. 4). However, there is no reason to doubt the Attorney General's statement that in California "general tax funds provide the primary source of funds to

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[1] It may be noted that appellee has stated, in his motion to affirm, that he will be a candidate for Governor in 1974.

defray election cost at both the state and local level." (Appellant's brief, p. 11, note 1.) It would appear, therefore, that while filing fees may reimburse the State of California for a substantial portion of the primary election costs, the burden of these costs is not entirely or principally shouldered by the candidates, as was the case under the Texas system.

B. The Appropriate Standard of Review

This case, like *Bullock*, presents an intertwining of two elements which the Court has considered crucial in judging the validity of state statutes under the Equal Protection Clause of the Fourteenth Amendment: the legislative classification (1) is "highly suspect" (*i.e.*, based on indigency or poverty), and (2) impinges upon "fundamental constitutional rights" (*i.e.*, voting and political association). *Bullock* made no new law in holding (405 U.S. at 144) that such a statutory classification "must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." See, *e.g.*, *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670; *Williams v. Rhodes*, 393 U.S. 23, 31; *McDonald v. Board of Election*, 394 U.S. 802, 807; *Shapiro v. Thompson*, 394 U.S. 618, 638; *Dunn v. Blumstein*, 405 U.S. 330, 335; *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172-73; *Chicago Police Dep't v. Mosley*, 408 U.S. 92, 95. Cf. *Boddie v. Connecticut*, 401 U.S. 371, 376; *Griffin v. Illinois*, 351 U.S. 12. We think it clear that the *Bullock* standard of review is equally applicable here.

However, even if the traditional "rational basis" test applies, the California filing-fee system is invalid. As Mr. Justice Powell stated for the Court in *Weber*, *supra*, at 172-73:

> The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. * * * Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny, * * *. The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate interest does the classification promote? What fundamental personal rights might the classification endanger?

Our basic submission to the Court is that, whether judicial scrutiny is "close" or otherwise, California has plainly imposed a *de facto* classification excluding poor candidates from the ballot solely because of their poverty or indigency; such exclusion promotes no legitimate state interest, "compelling" or otherwise, and denies poor candidates and their supporters the fundamental rights of voting and political association. Under a system, like California's, where payment of the required fee is an absolute condition to running for office, "the state has made failure to meet the condition a *disqualification from holding public office.*"[2]

We proceed from the basic premise that "the political franchise of voting" is a "fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*,

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[2]Comment, *The Constitutionality of Qualifying Fees for Political Candidates*, 120 U. Pa. L. Rev. 109, 117 (1971; emphasis in original). The various state filing-fee statutes are compiled in that comment at 136-41; see also Annotation, 89 A.L.R. 2d 864 (1963).

118 U.S. 356, 370. The right to vote in federal elections is conferred by Art. I, §2 of the Constitution. *United States v. Classic*, 313 U.S. 299, 314-15; *Harper v. Virginia Board of Elections*, 383 U.S. 663, 665. That right as well as the right to vote in state elections–whether or not implicit in the Fourteenth Amendment–includes the right to cast one's vote effectively. *Reynolds v. Sims*, 377 U.S. 533, 565; *Williams v. Rhodes*, 393 U.S. 23, 30. "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336. "For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. * * * [A] State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Harper, supra*, at 665, 666. In short, as the Court held in *Bullock, supra*, at 143-44, the right to vote is the right to cast a ballot for candidates of one's own choosing, and such exercise of the franchise may not be conditioned upon payment of a fee or be denied to some voters because they are less affluent than others.

For that reason, which is equally pertinent here, the Court in *Bullock* held that the "more rigid standard of review," requiring the state to make "a showing of necessity" which must be "closely scrutinized," was applicable to the Texas filing-fee system (405 U.S. at 142, 144, 147). Such "close scrutiny" and a "showing of necessity" were held appropriate in *Bullock* because "the Texas filing-fee system has a real and appreciable impact on the exercise of the franchise, and because this impact

is related to the resources of the voters supporting a particular candidate." (405 U.S. at 144.) The Court pointed out that the Texas system substantially limited voters in their choice of candidates; that "this limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system;" and that "endemic to the system" was a "disparity in voting power based on wealth" (*ibid.*).

The same observations may be made of the California system. While the range of fees is not so great, and the fees for some offices not so large, the fees required by the California statutes are more than nominal or minimal, and they produce a similar "disparity in voting power based on wealth." The costs of campaigning for elective public office are notoriously high,[3] and indeed prohibitive for many prospective candidates otherwise qualified and having substantial popular support. For a poor candidate and his supporters proposing to finance a campaign on a low budget, the requirement of a $425 or $982 filing fee paid to the state may make the difference between a candidacy which is viable and one which has no chance at all. Because the impact on exercise of the franchise is so "real and appreciable," and so "related to the resources of the voters supporting a particular candidate," the "showing of necessity" test of *Bullock* is equally applicable here.

In any event, as we argue below, even if the traditional, less stringent "rational basis" standard were used here,

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[3]See materials collected in Comment, *Advertising in Political Campaigns*, 60 Calif. L. Rev. 1371, 1384-86 (1972); Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U. L. Rev. 900 (1971); Rosenthal, *Campaign Financing and the Constitution*, 9 Harv. J. Legis. 359 (1972).

the California system would still be found wanting. As the Court stated in *Chicago Police Dep't v. Mosley*, 408 U.S. 92, 95, "As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." In another case last Term where the Court applied the traditional test to strike down a state classification under the Equal Protection Clause, *Reed v. Reed*, 404 U.S. 71, 76, it quoted with approval the formulation in *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, that a legislative classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Similarly, in *Weber v. Aetna Casualty & Surety Co.*, *supra*, at 174, a statutory classification was struck down because the Court could find "no significant relationship" to the legitimate legislative purposes. Cf. *James v. Strange*, 407 U.S. 128, 140, where the Court last Term found insufficient justification for a classification between indigents and other judgment debtors; *Eisenstadt v. Baird*, 405 U.S. 438, 447-50; *Tate v. Short*, 401 U.S. 395; *Williams v. Illinois*, 399 U.S. 235.

Thus, even under the traditional test, a legislative classification is justifiable under the Equal Protection Clause only if it furthers, or has a discernible substantial or significant relationship to, a legitimate state interest or purpose.

C. The Rationale of *Bullock* Is Equally Applicable Here

From a constitutional standpoint, the similarities in the Texas and California systems, as applied to indigent candidates, clearly transcend the minor differences between them. Under both systems (1) ability to pay the required fees is an absolute condition to being on the ballot; (2) indigent candidates are provided with no alternative means of access to the ballot; and (3) supporters of a candidate who cannot post the fee are deprived of any opportunity to vote for him.

Both systems have the same impact on indigent candidates and their supporters, and produce the same denial of equal access to the ballot, and of the right to cast an effective vote. To an indigent candidate, no matter how serious or *bona fide* his candidacy, a $425 filing fee which he is too poor to pay[4] excludes him as absolutely from the ballot as an $8,900 fee. It has the same exclusionary effect on his supporters in depriving them of the opportunity to vote for the candidate of their choice.

The Chief Justice's opinion for the Court in *Bullock* emphasized that "nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts." (405 U.S. at 149.) Relying upon the Court's careful disclaimer, appellant here argues that, in contrast to the magnitude of the

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[4]The standards for determining indigency are presumably the same as those applicable to federal *in forma pauperis* proceedings. See *Adkins v. DuPont Co.*, 335 U.S. 331. In respect to the latter, one need not be "absolutely destitute to enjoy the benefit of the statute" (*id.* at 339).

Texas fees involved in *Bullock*, the "California fees are specified by statute in a reasonable amount" (Brief, p. 7).

The test of "reasonableness" under the Equal Protection Clause, however, is distorted by any requirement that this Court make a subjective judgment in the abstract whether a particular filing fee is or is not "excessive" in amount. The question is, "reasonable" or "excessive" in relation to what? Whether a challenged state action is judged under the traditional or a more stringent standard of review, the focus of inquiry under the Equal Protection Clause is the relationship of the classification to the state interest sought thereby to be served.

In *Bullock*, and in *Jenness v. Fortson*, 403 U.S. 431, 442, the Court recognized that "a State has a legitimate interest in regulating the number of candidates on the ballot. [citations omitted] In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections. * * * Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." (*Bullock, supra*, at 145) But, as the Court went on to say, "even under conventional standards of review, a State cannot achieve its objective by totally arbitrary means; the criterion for differing treatment must bear some relevance to the object of the legislation." (*Ibid.*)

If the object of a filing-fee requirement is to include on the ballot only serious or *bona fide* candidates, and to weed out fraudulent or spurious candidates, it "is

extraordinarily ill-fitted to that goal." (*Bullock, supra*, at 146.) Because a candidate's seriousness cannot be measured by the size of his purse, the classification excludes both too much and too little. A rich man with only a few supporters, and whose only purpose is publicity or self-aggrandizement, can get on the ballot simply by reaching into his pocket.[5] A poor man, backed by many voters equally impoverished, who seeks public office in a serious effort to reform the welfare laws, or eliminate poverty, cannot get on the ballot solely because he lacks the money to pay the fee. California's filing-fee system neither excludes the fraudulent but affluent candidate from the ballot, nor permits the honest but poor candidate to gain a place on it. So misdirected a means of "protecting the integrity of the ballot" satisfies not even the most lenient standard of review under the Equal Protection Clause. Because fundamental rights are involved, "the Constitution simply requires the state to take better aim." Comment, *The Constitutionality of Qualifying Fees for Political Candidates*, 120 U. Pa. L. Rev. 109, 128 (1971). Cf. *Turner v. Fouche*, 396 U.S. 346, 363.

Other means to vindicate a state's legitimate interest in regulating the ballot are easily available. In *Jenness v. Fortson*, 403 U.S. 431, where no appeal had been taken from that part of the lower court's order invalidating the state's filing-fee system, this Court upheld a Georgia law requiring an independent candidate to have nominating petitions signed by at least five percent of the eligible voters in order to get his name on the ballot. The state, the Court held, may require "some preliminary showing

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[5]California's Elections Code also requires the filing of sponsor certificates (not less than 40 nor more than 60 for Representatives in Congress, §§6494-6495).

of a significant modicum of support" as a condition to placing a candidate on the ballot (403 U.S. at 442). As *Jenness v. Fortson* demonstrates, the Fourteenth Amendment poses no real obstacle to the states in pursuing the objective of confining the ballot to serious candidates. But the Equal Protection Clause does preclude the use of a test of financial means or property qualifications in determining which candidates are entitled to a place on the ballot.

For what is at stake, in judging a candidates' filing-fee requirement, is a *de facto* discrimination against the poor, infringing the fundamental constitutional rights of voting and political association.[6] *Bullock, supra; Harper v. Virginia Board of Elections*, 383 U.S. 663, 670; *Williams v. Rhodes*, 393 U.S. 23, 31. Thus, an indigent candidate for elective public office, who is otherwise qualified, is entitled to access to the ballot if he files an affidavit of poverty, as in the instant case, where the state provides him with no other means of getting on the ballot. Where a nominating petition signed by a specified number or percentage of voters is required by a state, it should be required of all prospective candidates and not merely those too poor to pay filing fees. For otherwise there would be an invidious discrimination favoring affluent candidates whose payment of the fees is no assurance either of their seriousness or any degree of voter support. See Note, *The Constitutionality of Candidate Filing Fees*, 70 Mich. L. Rev. 558, 585 (1972).

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[6] A candidate or political party adversely affected thereby has standing to assert denial of these constitutional rights. *Williams v. Rhodes, supra; Bullock, supra;* cf. *Eisenstadt v. Baird*, 405 U.S. 438, 443-46; *Griswold v. Connecticut*, 381 U.S. 479, 481; *NAACP v. Alabama*, 357 U.S. 449. Appellee brought the instant case both as a candidate and voter (Appendix, p. 4).

D. The Asserted Justification for California's Exclusion from the Ballot of Indigent Candidates Unable to Pay the Required Fees Is Inadequate.

The Attorney General of California seeks to justify its filing-fee system as a reasonable means for reimbursing the state for "a small portion of the total election costs." (Brief, p. 13) As previously indicated (*supra*, p. 7-9) it is not clear how large or small a portion of the total cost of conducting primary elections in California is borne by candidates' filing fees. In any event, *Bullock* holds that the cost of conducting such elections, like general elections, may not "be shifted away from the taxpayers generally," since it is a governmental function which should be "supported from general revenues." (405 U.S. at 148.) In so holding, the Court noted that a state which "has, as a matter of legislative choice, directed that party primaries be held * * * has presumably chosen this course more to benefit the voters than the candidates." (*Ibid.*)

The plain implication of footnote 29 in the *Bullock* opinion (p. 148) is that the only kind of filing fee which might pass constitutional muster is one approximating "the cost of processing a candidate's application for a place on the ballot." Such filing fees would be the same for all candidates on the ballot, regardless of the office sought, since the processing costs would be the same. There would be no difference in fees, as under the California and Texas systems, depending on the salary of the office sought. In sharp contrast, the filing fees here involved are in the nature of a tithe that the state exacts from candidates, bearing no relation either to the costs of the election or to the costs of "filing" or processing their applications.

A true "filing fee", such as described in *Bullock's* footnote 29, would necessarily be small, and in practical effect would be a barrier to very few, if any, *bona fide* candidates. Nevertheless, as a matter of constitutional principle, even such a $5 or $10 requirement, assuming its validity as applied to non-indigent candidates, could not be enforced to exclude from the ballot an otherwise qualified candidate who is so poor that he cannot pay the fee. Cf. *Boddie v. Connecticut*, 401 U.S. 371; *Harper v. Virginia Board of Elections*, 383 U.S. 663; *Griffin v. Illinois*, 351 U.S. 12.

The Attorney General states in his brief (p. 12):

> "Clearly, not all interest groups can have a hand-picked candidate on the ballot."

Under the California system, any interest group *can* have a hand-picked candidate on the ballot so long as he, or they, can afford to pay the filing fee. The only group which is excluded are those too poor to finance a campaign which has enough funds to pay the fee required by the state.

The Attorney General states (p. 12):

> "The candidate filing fees actually developed from a political reform movement with the premise that reasoned choice was enhanced by reducing the number of choices to be made."

This premise comports with the Equal Protection Clause only if the reduction of candidates is not made on the basis of race, poverty, sex, color of hair, or other arbitrary classification.

The Attorney General states (p. 13):

> "It is reasonable to exclude some aspiring candidates from the ballot."

Again, we would agree, provided the exclusion is not based on a financial means test or some other criterion forbidden by the Constitution. It is reasonable to exclude aspiring candidates who have been convicted of accepting bribes or graft while previously in office. See 18 U.S.C. 201(e), 203. But it is not reasonable to exclude aspiring candidates because of their poverty. As Judge Thornberry has said, "It is no answer to proclaim that those candidates without substantial backing cannot seriously hope to win. The seriousness and legitimacy of a political effort is not to be measured by the bullion with which it is bulwarked. Though modern politics may dictate that low budgets do not win elections, it cannot be doubted that those with low budgets are entitled to try." *Carter v. Wischkaemper*, 321 F. Supp. 1358, 1364 (N.D. Tex.) (concurring opinion).

Finally, the Attorney General states (p. 13):

> "If 425 voters believe in a candidate, $1 per voter will place their candidate on the ballot seeking the party nomination for Representative in Congress. Viewed in that context, the candidate's lack of personal resources is not a significant let alone a critical factor."

To require a group of voters to pay the filing fee of an indigent candidate whom they support is, in practical terms, to impose a selective, discriminatory poll tax on such voters. As this Court held in *Williams v. Rhodes*, 393 U.S. 23, 30, a state may not burden "the rights of individuals to associate for the advancement of political beliefs, and the rights of qualified voters, regardless of political persuasion, to cast their votes effectively."

Imposing a financial cost, no matter how small, on voters in order to exercise the right to cast a vote for the candidate of their choice, simply because of his poverty,

cannot be constitutionally justified. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668. "To the extent that the [Texas] system requires candidates to rely on contributions from voters in order to pay the assessments, * * * it tends to deny some voters the opportunity to vote for a candidate of their choosing; at the same time it gives the affluent the power to place on the ballot their own names or the names of persons they favor. * * * [W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status." *Bullock, supra*, at 144.

It is an unfortunate fact of American political life that, of all the democracies, the United States consistently has the lowest voter participation in elections. Less than 55% of the potentially eligible voters cast ballots in the recent Presidental election. But for all elections, local as well as national, apathy is especially high among the poor. "There is a direct correlation between income and political participation. The poor do not vote in large numbers. * * * [The] larger need is to enrich the lives and widen the horizons of the poor and thereby raise their stake in citizenship."[7]

Candidate filing-fees limit participation of the poor in the political processes, and thereby reduce their stake in citizenship.[8] The provisions of California's Elections Code requiring such fees, absolutely excluding an indigent candidate from the ballot and denying his

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[7]Editorial, "The Voting Mystery," N.Y. *Times*, Dec. 4, 1972, p. 38.

[8]On the use of filing-fees as a device for preventing blacks from running for public office, see *Political Participation*, Report of the U.S. Commission on Civil Rights (1968), pp. 43-44.

supporters any opportunity to vote for the candidate of their choice, constitute a discriminatory classification which impinges on fundamental constitutional rights, is justified by no legitimate state interest, compelling or otherwise, and cannot withstand judicial scrutiny under the Equal Protection Clause.[9]

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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[9] Although not attacked below on that ground, these provisions may also be unconstitutional as adding qualifications for election to Congress not found in Article I, section 2 of the Constitution. See Note, *The Constitutionality of Candidate Filing Fees*, 70 Mich. L. Rev. 558, 565 (1972). Cf. *Powell v. McCormack*, 395 U.S. 486.